

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

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| DAVID K. WARREN, |) | |
| |) | No. CV-12-0335-LRS |
| Plaintiff, |) | |
| |) | ORDER GRANTING DEFENDANT'S |
| v. |) | MOTION FOR SUMMARY JUDGMENT |
| |) | |
| CAROLYN W. COLVIN, Commissioner |) | |
| of Social Security, |) | |
| |) | |
| Defendant. |) | |
| |) | |
| |) | |

BEFORE THE COURT are cross-motions for summary judgment, noted for hearing without oral argument. Attorney Maureen J. Rosette represents Plaintiff; Special Assistant United States Attorney Richard A. Morris represents the Commissioner of Social Security (Defendant or Commissioner). After reviewing the administrative record and the briefs filed by the parties, the court **GRANTS** Defendant's motion for summary judgment, **ECF No. 18.**

JURISDICTION

Plaintiff filed his applications for disability insurance benefits and SSI benefits on March 25, 2008 (Tr. 127). He alleged disability since March 22, 2007 because of "Cognitive disorder, Schizophrenia, Memory, Anger, Concentration, Personality Disorder, and possible dementia" (Tr. 171). At the hearing, Plaintiff amended the alleged onset date to November 1, 2009 (Tr. 21, 64-65). Plaintiff's applications were denied at the initial (Tr.

77) and reconsideration (Tr. 83, 85) levels. Plaintiff filed a Request for Hearing on August 27, 2008 (Tr. 87). On March 25, 2010, an ALJ conducted a hearing where Plaintiff appeared and testified, represented by an attorney (Tr. 36-72). A vocational expert also testified. On June 15, 2010, the ALJ issued a decision finding Plaintiff not disabled as defined in the Social Security Act (Tr. 18-35). The Appeals Council denied Plaintiff's request for review (Tr. 1), making the ALJ's decision the Commissioner's final decision. 20 C.F.R. §§ 404.981, 416.1481, 422.210. Plaintiff timely filed a Complaint in this Court on May 2, 2012.

STATEMENT OF FACTS

The facts have been presented in the administrative hearing transcript, the ALJ's decision, and the briefs of the parties. This court will adopt those facts and provide a brief summary.

Plaintiff was 63 years old on the alleged onset date and the date of the hearing (Tr. 31, 40), closely approaching retirement age (age 60 or over) at all pertinent times. 20 C.F.R. §§ 404.1563(e), 416.963(e). Plaintiff has two bachelor's degrees (English and Psychology) and one year of graduate school (Tr. 40, 201). He has worked as a telemarketer, lumber handler, commercial cleaner, and material handler (Tr. 30, Finding 6; 67-68). It is unclear whether Plaintiff holds a driver's license but he reported that he takes the bus or his sister gives him rides (Tr. 47). Plaintiff reported on a "Psychosocial Interview" Form that he has had five DWIs. (Tr. 311). He is divorced, lives by himself, and is able to prepare his own meals and eat regularly, bathes regularly and attends to basic hygiene, does his laundry, and

1 reports no difficulty in doing daily household chores. (Tr. 40,
2 262). He states he has had quite a bit of trouble in the past
3 with alcohol and drinking. (Tr. 49). Plaintiff reports he quit
4 drinking in January of 2008 (Tr. 187). Plaintiff also testified
5 that he used illegal drugs in the past (Tr. 57-58) but reports
6 being abstinent from cocaine since January of 2008 (Tr. 231). He
7 reports he smoked a pack per day for 40 years but quit smoking in
8 May of 2007. (Tr. 187, 213). He testifies that he has some
9 memory problems. (Tr. 43). He also testified he spends a lot of
10 time at the library doing research and learning the computer.
11 (Tr. 43). He states he has experienced anxiety attacks in the
12 past. (Tr. 48). He has decreased his coffee intake to one cup,
13 and has had no panic attacks since October of 1998. (Tr. 48).

14 **ALJ'S FINDINGS**

15 At step one, the ALJ found Plaintiff had not engaged in
16 substantial gainful activity since November 1, 2009, the alleged
17 onset date (Tr. 23, Finding 2). 20 C.F.R. §§ 404.1520(b).
18 416.920(b). At step two, the ALJ found Plaintiff had the following
19 severe impairments: organic mental disorder, alcohol abuse,
20 alcoholic polyneuropathy, polyuria, generalized anxiety disorder,
21 and dementia (Tr. 23, Finding 3). 20 C.F.R. §§ 404.1520(c),
22 416.920(c). At step three, the ALJ found that Plaintiff's
23 impairments did not meet or equal the requirements of a listed
24 impairment (Tr. 24, Finding 4). 20 C.F.R. §§ 404.1520(a)(4)(iii),
25 404.1520(d), 416.920(a)(4)(iii), 416.920(d).

26 The ALJ found that Plaintiff retained the residual functional
27 capacity to perform a full range of work at all exertional levels,
28 but with the following nonexertional limitations: [he] can perform

1 simple and some complex tasks; needs to be in an isolated setting
2 to focus on tasks; may need extra time to adapt to changes in work
3 settings; moderate restrictions in the ability to maintain
4 sustained attention, concentration, and persistence for extended
5 periods; and moderate restrictions in the ability to interact
6 appropriately with the public or respond appropriately to changes
7 in the work setting. (Tr. 25, Finding 5). 20 C.F.R. §§
8 404.1520(e), 404.1545, 416.920(e), 416.946, and 404.1567, 416.967
9 (defining exertional levels of work). In making these findings,
10 the ALJ found that although Plaintiff's medically determinable
11 impairments could reasonably be expected to cause the alleged
12 symptoms, his statements concerning the intensity, persistence,
13 and limiting effects of these symptoms are not credible to the
14 extent they are inconsistent with the determined residual
15 functional capacity assessment (Tr. 29).

16 At step four, the ALJ found Plaintiff was capable of
17 performing his past relevant work as a lumber handler, commercial
18 cleaner, and material handler as actually performed and as
19 generally performed in the general economy. This work did not
20 require the performance of work-related activities precluded by
21 Plaintiff's residual functional capacity (Tr. 30, Finding 6). 20
22 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). Because Plaintiff
23 was unable to meet his burden of showing that he could not perform
24 his past relevant work, the ALJ was not required to and did not
25 proceed to step five of the sequential process. The ALJ,
26 therefore, found Plaintiff was not under a disability, as defined
27 in the Social Security Act from November 2, 2009, through the
28 date of the decision (Tr. 30, Finding 7). 20 C.F.R. §§

1 404.1520(a)(4)(v), 404.1520(g), 416.920(a)(4)(v), 416.920(g).

2 ISSUES

3 Plaintiff alleges that there was not substantial evidence to
4 support the ALJ's conclusions. More specifically, Plaintiff
5 believes that he is more limited from a psychological standpoint
6 than what was determined by the ALJ. Plaintiff further believes
7 that the ALJ did not properly consider nor reject the opinions of
8 Dr. Dalley, and, based on this error, the ALJ 's decision must be
9 reversed.

10 The Commissioner disagrees, asserting the ALJ's decision is
11 supported by substantial evidence and free of legal error. The
12 Commissioner specifically argues that the ALJ properly considered
13 the medical reports and opinions. The Commissioner asks the Court
14 to affirm the Agency's final decision that Plaintiff was not
15 disabled under the Social Security Act (ECF No. 19 at 16).

16 DISCUSSION

17 **A. Psychological Evidence: Mahlon Dalley, Ph.D.'s Opinions 18 and James Bailey, Ph.D.'s Opinion**

19 Plaintiff alleges that the ALJ did not properly consider or
20 reject the opinions of psychologist Mahlon Dalley, Ph.D., made in
21 two psychological evaluations. (ECF No. 17 at 6-10). Plaintiff
22 also argues that the ALJ gave too much weight, or incorrectly
23 "relied primarily on" the non-examining, non-treating opinion of
24 reviewing psychologist, James Bailey, Ph.D. (ECF No. 17 at 8).

25 On March 21, 2008 and March 28, 2008, Plaintiff
26 underwent a psychological evaluation (TR 221-232). Dawn Wilcox,
27 BA, MS Candidate, Brooke Sjostrom, MS, LMHC, and Mahlon Dalley,
28 PhD, completed the evaluation (TR 232). The examiners conducted a

1 background history, a mini-mental status examination, and
2 psychological testing (Tr. 225-26) and Plaintiff was diagnosed
3 with alcohol dependence; cocaine dependence in early, full
4 remission; cognitive disorder, NOS; and a rule-out diagnosis of
5 alcohol-induced persisting dementia (TR 230).

6 Plaintiff scored 29 out of 30 points on the mini-mental
7 status examination, with 24 being the cut-off to be classified in
8 the impairment range (Tr. 226). Plaintiff appeared to exhibit
9 average mental control and demonstrated a good fund of general
10 information, and an ability to think abstractly (Tr. 226). Trails
11 A and B testing, used for visual-conceptual and visual-motor
12 tracking, were in the normal limits range (Tr. 22). Plaintiff's
13 scores on the Wechsler Adult Intelligence Scale-3 (WAIS-3) were:
14 verbal IQ of 122 (93rd percentile), performance IQ of 99 (47th
15 percentile), and full scale IQ of 112 (79th percentile). His
16 overall performance was classified in the high average range (Tr.
17 228). Wechsler Memory Scale-III (WMS-III) results suggested
18 significant cognitive impairments in immediate, visual, delayed,
19 and general memory abilities (Tr. 229). The examiners administered
20 the Minnesota Multiphasic Personality Inventory-2 (MMPI-2), which
21 measures emotional adjustment. People with similar scores to
22 Plaintiff's, report difficulties in concentration and attention,
23 as well as memory deficits (Tr. 230).

24 The master's level therapists, working under the supervision
25 of Dr. Dalley, assessed Plaintiff's ability to do work activities,
26 concluding that Plaintiff would have several moderate and marked
27 work-related limitations (TR 223). Plaintiff asserts that even
28 though the ALJ had given little weight to these opinions because

1 Dr. Dalley signed off as the releasing authority and did not
2 examine Plaintiff, it is Plaintiff's position that the opinion of
3 a master's level therapist, who works in conjunction with a
4 psychologist, should constitute that of an acceptable medical
5 source.

6 On January 26, 2009, Ms. Wilcox again evaluated Plaintiff,
7 under the supervision of Dr. Dalley (Tr. 260-64). Ms. Wilcox
8 reviewed prior records, and conducted a mini-mental status
9 examination and psychological testing (Tr. 261). The mini-mental
10 status examinations results were virtually identical to the March
11 2008 results (Tr. 261). The Trails A testing result was in the
12 normal range, and the Trails B result was in the mild impairment
13 range, likely related to performance anxiety (Tr. 261-62). MMPI-II
14 testing again showed scores similar to others who reported
15 difficulties in concentration and attention, as well as memory
16 deficits (Tr. 262). Ms. Wilcox and Dr. Dalley diagnosed cognitive
17 disorder, NOS; generalized anxiety disorder; alcohol dependence,
18 early full remission (by his report); cocaine dependence,
19 sustained full remission (by his report); and rule/out
20 alcohol-induced persisting dementia (Tr. 262). They assigned a GAF
21 score of 47 (Tr. 263). A GAF score of 41 to 50 indicate serious
22 symptoms or (e.g., suicidal ideation, severe obsessional rituals,
23 frequent shoplifting) or any serious impairment in social,
24 occupational, or school functioning (e.g., no friends, unable to
25 keep a job). DSM-IV-TR at 32-34. Plaintiff's current cognitive
26 deficits were likely to interfere with his ability to maintain
27 employment (Tr. 263-64).

28 Ms. Wilcox completed a DSHS Psychological/Psychiatric

1 Evaluation form, also signed by Dr. Dalley (Tr. 265-68). They
2 opined Plaintiff had marked limitations in the ability to relate
3 appropriately to co-workers and supervisors; and the ability to
4 respond appropriately and tolerate the pressures and expectations
5 of a normal work setting (Tr. 267). They found moderate
6 limitations in three other cognitive and social factors (Tr. 267).

7 Plaintiff argues that if Dr. Dalley's opinions were properly
8 credited, the ALJ would have to determine that Plaintiff was much
9 more limited from a psychological standpoint and disabled
10 based on vocational expert testimony, wherein the vocational
11 expert testified that there would be no work in the national
12 economy Plaintiff was capable of performing with the limitations
13 set forth by Dr. Dalley. ECF No. 21 at 3.

14 The Commissioner in its motion for summary judgment, asserts
15 that an ALJ is responsible for judging the medical evidence. The
16 Commissioner asserts that the ALJ is "the final arbiter" who
17 resolves medical evidence ambiguities. *Tommasetti v. Astrue*, 533
18 F.3d 1035, 1041 (9th Cir. 2008). So long as there is more than a
19 scintilla of evidence to support the interpretation of the medical
20 evidence the ALJ provides, and that interpretation is based on the
21 correct legal standards, it should not be overturned. *Valentine v.*
22 *Comm'r Soc. Sec. Admin.*, 574 F.3d 685, 690 (9th Cir. 2009). The
23 Commissioner states that the ALJ found that although Dr. Dalley
24 signed the evaluation reports, there is no indication that he ever
25 examined the claimant (Tr. 29). Further, the Commissioner argues
26 that the ALJ found the opinions inconsistent with the examiners'
27 recommendations for treatment, or more specifically, the lack
28 thereof (Tr. 29). The ALJ reasonably interpreted the examination

1 findings as inconsistent with the opinions on limitations because
2 either treatment or abstinence from alcohol and drug use would
3 likely improve Plaintiff's symptoms.

4 Second, the Commissioner argues, the ALJ found the opinions
5 without substantial support from other evidence of record (Tr.
6 29). An opinion that is conclusory and inconsistent with the rest
7 of the evidence is properly rejected. *Meanel v. Apfel*, 172 F.3d
8 1111, 1113-14 (9th Cir. 1999).

9 Third, the Commissioner asserts the ALJ properly relied on
10 the findings of State agency reviewing psychologist, James Bailey,
11 Ph.D. (Tr. 29). State agency medical consultants are experts in
12 the evaluation of medical issues in disability claims under the
13 Social Security Act. 20 C.F.R. §§ 404.1527(f), 416.927(f), and SSR
14 96-6p, available at 1996 WL 374180. Dr. Bailey reviewed the
15 medical evidence and completed a Mental Residual Functional
16 Capacity Assessment in June 2008 (Tr. 248-51). It was Dr. Bailey's
17 opinion that Plaintiff was capable of at least simple and some
18 complex tasks; his concentration may be interrupted at times; he
19 would do best in a more isolated work setting to help him stay
20 focused; and he may need extra time to adapt to changes in the
21 workplace (Tr. 250). In August 2008, State agency psychologist
22 Edward Beatty, Ph. D., affirmed Dr. Bailey's assessment (Tr. 259).

23 **B. Analysis**

24 This Court finds that Plaintiff's contention that the ALJ did
25 not properly consider the medical reports and opinions is
26 unfounded. The ALJ's decision has considered the opinions of Dr.
27 Dalley, however he accorded them less weight than Plaintiff would
28 like. The ALJ explained his reasons for giving the opinions of Dr.

1 Dalley little weight (Tr. 29).

2 The ALJ first noted that Ms. Sjostrom and Ms. Wilcox were
3 working under Dr. Dalley's supervision, and Dr. Dalley adopted
4 their findings and conclusions as his own (Tr. 232, 264). The ALJ
5 concluded that there was no indication Dr. Dalley ever examined
6 the Plaintiff (Tr. 29). Plaintiff's argument, however, that the
7 therapists working in conjunction with Dr. Dalley constitutes an
8 acceptable medical source, has merit. *See Gomez v. Chater*, 74
9 F.3d 967, 971 (9th Cir. 1996). It appears the ALJ did review and
10 fully consider Dr. Dalley's opinions, but accorded them little
11 weight. The Court finds that the ALJ interpreted the medical
12 evidence, as legally empowered to do, and gave clear reasons for
13 his findings. The ALJ found that the opinions were inconsistent
14 with the examiners' recommendations for treatment, or lack
15 thereof. (Tr. 29). In this regard, the ALJ found:

16 While both examiners opined the claimant has
17 marked limitations in his ability to relate
18 appropriately with co-workers and
19 supervisors, as well as respond appropriately
20 to and tolerate the pressures and expectations
21 of a normal work setting, such findings are
22 inconsistent with their recommendations of
23 treatment or lack thereof (Exhibit 5F/4 &
24 13F/6). Although both examiners noted that
25 mental health intervention is not likely to
26 restore or substantially improve the
27 individual's ability to work for pay in a
28 regular and predictable manner, they also
noted that he does not currently receive
mental health services and there is no
indication that Ms. Sjosrom [sic] or Ms.
Wilcox actually treated the claimant outside
of these evaluations (Id. at 5 & 9). Both
examiners opined the claimant's current
cognitive deficits are likely to interfere
with his ability to successfully initiate or
maintain regular employment; yet both
examiner's also recommended he be re-assessed
after he is able to maintain an extended
period of abstinence in order to evaluate
whether his cognitive ability has improved or

declined further, which suggests that both examiners are unsure as to how abstinence and/or treatment will affect his ability to initiate or sustain employment. Additionally, the opinions are without substantial support from the other evidence of record, which obviously renders it less persuasive.

Tr. 29.

The Court finds that the ALJ reasonably interpreted the examination findings as inconsistent with the opinions on limitations because either treatment or abstinence would likely improve Plaintiff's symptoms. It is noted that Ms. Sjostrom found marked limitations in two social factors, where alleviation of depression and anxiety would be more likely to have a positive effect, rather than in cognitive factors, where the effect would likely be less. (Tr. 222-23). Similarly, Ms. Wilcox indicated that abstinence would likely alleviate some anxiety symptoms (Tr. 266), and that alcohol or drug abuse may exacerbate Plaintiff's cognitive symptoms (Tr. 267). These clinical findings clearly support the ALJ's findings. An impairment that can be controlled effectively is not disabling for social security purposes. *Warre v. Comm'r of Soc. Sec. Admin.*, 439 F.3d 1001, 1006 (9th Cir.2006).

Next, the ALJ properly considered the abnormal test results administered by the examiners working under the supervision of Dr. Dalley. More specifically, the WMS-II and MMPI-2 results indicated concentration and memory deficits. The ALJ then considered and compared these results to the limitations shown on the DSHS forms for cognitive factors. The limitations shown on the DSHS forms were moderate (significant), rather than marked (very significant). The ALJ's RFC finding incorporated these limitations by concluding Plaintiff could perform simple and some complex tasks, needed an isolated setting to focus on tasks, may

1 need extra time to adapt to changes, and had moderate restrictions
2 in the ability to maintain sustained attention, concentration, and
3 persistence (Tr. 25).

4 Lastly, the Court finds that the ALJ's reliance on the
5 findings of State Agency reviewing psychologist, James Bailey,
6 Ph.D. was not in error. The ALJ noted that although State agency
7 physicians are non-examining, such opinions are entitled to some
8 weight particularly when there are other reasons to reach similar
9 conclusions (Tr. 29). Dr. Bailey reviewed the medical evidence
10 and completed a Mental Residual Functional Capacity Assessment in
11 June 2008 (Tr. 248-51). It was Dr. Bailey's assessment, which was
12 affirmed by Dr. Beatty, Ph.D., that Plaintiff was capable of at
13 least simple and some complex tasks; his concentration may be
14 interrupted at times; he would do best in a more isolated work
15 setting to help him stay focused; and he may need extra time to
16 adapt to changes in the workplace (Tr. 250). The Court finds that
17 the ALJ's findings regarding the examining source opinions are
18 rational conclusions based on all of the evidence. The evidence
19 here is susceptible to more than one rational interpretation, one
20 of which supports the ALJ's decision. *Tommasetti v. Astrue*, 533
21 F.3d 1035, 1038 (9th Cir. 2008).

22 C. Standard of Review

23 "The [Commissioner's] determination that a claimant is not
24 disabled will be upheld if the findings of fact are supported by
25 substantial evidence, 42 U.S.C. § 405(g)...." *Delgado v. Heckler*,
26 722 F.2d 570, 572 (9th Cir. 1983). Substantial evidence is more
27 than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119
28 n.10 (9th Cir. 1975), but less than a preponderance. *McAllister*

1 *v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989); *Desrosiers v.*
2 *Secretary of Health and Human Services*, 846 F.2d 573, 576 (9th
3 Cir. 1988). "It means such relevant evidence as a reasonable mind
4 might accept as adequate to support a conclusion." *Richardson v.*
5 *Perales*, 402 U.S. 389, 401 (1971). "[S]uch inferences and
6 conclusions as the [Commissioner] may reasonably draw from the
7 evidence" will also be upheld. *Beane v. Richardson*, 457 F.2d 758,
8 759 (9th Cir. 1972); *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th
9 Cir. 1965). On review, the court considers the record as a whole,
10 not just the evidence supporting the decision of the Commissioner.
11 *Weetman v. Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989), quoting
12 *Kornock v. Harris*, 648 F.2d 525, 526 (9th Cir. 1980); *Thompson v.*
13 *Schweiker*, 665 F.2d 936, 939 (9th Cir. 1982).

14 It is the role of the trier of fact, not this court to
15 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If
16 evidence supports more than one rational interpretation, the court
17 must uphold the decision of the ALJ. *Allen v. Heckler*, 749 F.2d
18 577, 579 (9th Cir. 1984).

19 A decision supported by substantial evidence will still be
20 set aside if the proper legal standards were not applied in
21 weighing the evidence and making the decision. *Browner v.*
22 *Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th
23 Cir. 1987).

24 **D. Conclusion**

25 The ALJ applied correct legal standards and cited substantial
26 evidence in finding that Plaintiff was capable of performing his
27 past relevant work as a lumber handler, commercial cleaner, and
28 material handler, as actually performed, and as generally

1 performed, in the national economy.

2 **IT IS ORDERED:**

3 1. Defendant's Motion for Summary Judgment, **ECF No. 18**, is
4 **GRANTED.**

5 2. Plaintiff's Motion for summary Judgment, **ECF No. 16**, is
6 **DENIED.**

7 The District Court Executive is directed to file this Order,
8 provide copies to counsel, enter judgment in favor of defendant,
9 and **CLOSE** this file.

10 DATED this 16th day of October, 2013.

11
12 **s/Lonny R. Suko**

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LONNY R. SUKO
14 UNITED STATES DISTRICT JUDGE
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